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HAL v. HAS

HIGH COURT MALAYA, KUALA LUMPUR
EVROL MARIETTE PETERS J
[DIVORCE PETITION NO: WA-33-283-05-2021]
13 MAY 2024

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Abstract – *The law does not extend its assistance to those who are passive in their legal pursuits; a maxim that holds true even in family law proceedings. Permitting an individual to cite adultery as the catalyst for the dissolution of marriage, following years of awareness without action, would not only defy principles of justice and equity but would also contravene the very essence of accountability.*

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FAMILY LAW: *Marriage – Divorce – Spousal maintenance – Petitioner husband converted to Islam and married Muslim woman and had child – Factors considered in awarding spousal maintenance – Whether breakdown of marriage between parties due to husband's conversion to Islam – Whether due to husband's adulterous relationship – Whether subsequent marriage and birth of child refuted claims of adultery by respondent wife – Whether wife aware of adultery – Whether wife found adultery intolerable – Whether spousal maintenance should be awarded – 'Means and needs' test – Law Reform (Marriage and Divorce) Act 1976, s. 54(1)*

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FAMILY LAW: *Marriage – Divorce – Matrimonial assets – Divorce petition by petitioner husband – Cross petition by respondent wife – Claim by wife for equal division of matrimonial assets – Whether claim proven – Law Reform (Marriage and Divorce) Act 1976, s. 86*

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The petitioner husband and the respondent wife were married in 1974 and were blessed with four children. During their marriage, the respondent dedicated her life to homemaking and raising the children while the petitioner pursued a career as a contractor of his company, Syarikat Pembinaan dan Perniagaan Ngai Shoot Sdn Bhd ('Ngai Shoot'). In 2000, the petitioner converted to Islam, married a Muslim woman ('TEB') and had a daughter. In 2021, the petitioner-initiated divorce proceedings against the respondent while the respondent cross-petitioned. The respondent (i) admitted her awareness of the adultery between the petitioner and TEB but maintained that she only learned about the subsequent marriage between them, along with the birth of their daughter, a few years later; (ii) sought a lump sum of RM200,000 to address outstanding maintenance for the last 20 years; and (iii) asserted that she was entitled to an equal share, advocating for a 50% division of all assets accumulated by the petitioner throughout the duration of the marriage. The petitioner argued that: (i) his subsequent marriage to TEB and the birth of their daughter refuted any claims of adultery by the respondent; and (ii) the court lacked jurisdiction to probe into the relationship between the petitioner and TEB as their marriage was

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solemnised under Islamic and was beyond reproach. The issues that arose were (i) in regard to whether spousal maintenance should be awarded, (a) whether the breakdown of the marriage was due to the petitioner's conversion to Islam or whether it was due to the petitioner's adulterous relationship with TEB and, if it was due to such adultery, whether the respondent had found it intolerable; and (b) whether the respondent had fulfilled the 'means and needs' test to justify her claim for arrears in maintenance; and (ii) in regard to the matrimonial assets, whether the respondent was entitled to equal division of all the matrimonial assets which included the matrimonial home, other immoveable properties, shares in Ngai Shoot, vehicles and watches and jewelry.

Held (granting divorce and *decree nisi* absolute):

(1) TEB had conceded that both she and the petitioner had engaged in sexual intercourse prior to their marriage. Additionally, TEB admitted to being pregnant with their daughter before her marriage to the petitioner, refuting the petitioner's claim that no such sexual relations with TEB had occurred prior to the marriage. The next issue was whether the respondent had found the adultery intolerable, as outlined in s. 54(1)(a) of the Law Reform (Marriage and Divorce) Act 1976 ('Act'). Despite the knowledge of the adultery, the respondent chose not to pursue a divorce and even continued to accept maintenance from the petitioner, although sporadically, until 2012. The respondent's failure to act upon her knowledge of the petitioner's adultery, coupled with her prolonged continuation of the marriage, signified a tacit acceptance or tolerance of the situation. The respondent was not in a position to assert that the marriage had irretrievably broken down due to adultery. (paras 16, 18, 22, 24 & 25)

(2) The substantial amount sought by the respondent, *ie*, RM200,000 was not warranted for the following reasons: (i) as outlined in s. 86 of the Act, any directive regarding arrears of maintenance was constrained to a maximum period of three years; (ii) there lacked a justifiable basis for such an exorbitant amount. Divorce proceedings should not devolve into a means of financial gain; (iii) the respondent's acknowledgment stood as evidence that notwithstanding the petitioner's marriage to TEB, he continued to provide financial support to the respondent, extending as far as 2012. Therefore, the assertion by the respondent of not receiving maintenance for the past two decades was demonstrably inaccurate; and (iv) the respondent admitted that she had been receiving rental income from a property ('Bunga Raya property') which was jointly registered in the names of the petitioner and one of their daughters. The rental income had already served as a form of maintenance received by the respondent as that property did not belong to her. (paras 35-38)

(3) Transferring the petitioner's half share in the Bunga Raya property to the respondent was warranted for several reasons, *inter alia*, (i) the respondent's financial needs were being met through the rental income from the Bunga Raya property. Maintaining this arrangement would alleviate the necessity for monthly maintenance payments; (ii) the absence of objections from the petitioner, regarding the respondent's receipt of rental income over the years, implied tacit acceptance. Therefore, it was equitable to uphold this arrangement; and (iii) considering that the petitioner initiated the divorce proceeding without fault on the part of the respondent, fairness dictated ongoing support from the petitioner. The petitioner's half share of the matrimonial home was also ordered to be transferred to the respondent. Given that the matrimonial home was the respondent's sole residence and considering her age and familiarity with the property, the respondent should continue to reside in the matrimonial home and own it. (paras 42-44, 52 & 53)

(4) The respondent's claim for division of shares in Ngai Shoot was dismissed as, *inter alia*, (i) the petitioner had ceased involvement with Ngai Shoot, having retired from any directorial or employment roles. Consequently, he no longer relied on Ngai Shoot for income; (ii) the respondent neglected to establish any connection between herself and Ngai Shoot; and (iii) dividing any interest which the petitioner held in Ngai Shoot would directly impact his ability to fulfil familial obligations, particularly in supporting his young daughter's education. (paras 58, 60 & 61)

(5) The respondent claimed for a share in the value of a Daihatsu Delta Commercial Truck, a Mercedes Benz E200 and a Honda CRV and, as evidence, adduced registration certificated of the vehicles dated 2006, 2009 and 2010, respectively. There was no current documentation confirming the status of these vehicles. Additionally, considering the respondent's prolonged inaction over approximately a decade, it would be unjust to grant her a division of assets purchased so long ago. Furthermore, the Daihatsu Delta Commercial Truck was not owned by the petitioner but by Ngai Shoot. Therefore, no division of this vehicle could be justified as it belonged to a third party, namely the company. (paras 62-64)

(6) As for the monies in the petitioner's fixed deposit bank accounts and Tabung Haji Amanah Trust Fund, alongside the jewellery and watches supposedly owned by the petitioner, the respondent's claim lacked specificity and supporting evidence. The respondent failed to provide detailed descriptions of these items; nor did she produce any documentary evidence to substantiate her assertions. In contrast, the petitioner asserted that any watches and jewellery in his possession were acquired post-separation. (para 65)

Case(s) referred to:
AJS v. JMH & Another Appeal [2022] 1 CLJ 331 FC ***(refd)***
Annathurai Venkidasalam v. Vani Welluven [2023] CLJU 2191; [2023] 1 LNS 2191 CA ***(refd)***
Bonham-Carter v. Hyde Park Hotel Ltd [1948] 64 TLR 177 ***(refd)***
Ching Seng Woah v. Lim Shook Lin (F) [1997] 1 CLJ 375 CA ***(refd)***
Dr Shameni Pillai PB Rajedran v. Dr S Arulselvam Sanggilly & Anor [2011] 6 CLJ 782 HC ***(refd)***
Muthuraja Suppiah v. Sukumar Kokila [2020] CLJU 2183; [2020] 1 LNS 2183 HC ***(refd)***
Sum Kum v. Devaki Nair & Anor [1963] CLJU 131; [1963] 1 LNS 131 FC ***(refd)***
V Sandrasagaran Veerapan Raman v. Dettarassar Velentine Souvina Marie [1999] 5 CLJ 474 HC ***(refd)***
Yap Yen Piow v. Hee Wee Eng [2016] CLJU 1060; [2016] 1 LNS 1060 CA ***(refd)***

Legislation referred to:
Evidence Act 1950, s. 103
Law Reform (Marriage and Divorce) Act 1976, ss. 51, 54(1)(a), 76, 77(1), 78, 86
Women's Charter 1961 [Sing], s. 95(5)

For the petitioner - Harmy Yusoff & Sofiyya Nizar; M/s Harmy Yusoff & Azli
For the respondent - Jazzmine Khoo & Ho Shu Ping; M/s Jazzmine Khoo & Assocs

Reported by Najib Tamby

JUDGMENT

Evrol Mariette Peters J:

Introduction

[1] This was the petitioner-husband's petition for divorce, on ground of his conversion to Islam; while the respondent-wife countered with a cross-petition alleging adultery. Additionally, she sought arrears in spousal maintenance, and an equitable division of all matrimonial assets.

[2] Given the privacy of parties and sensitivity of issues in these proceedings, the petitioner, and respondent have been anonymised respectively as HAL and HAS.

The Factual Background

[3] The petitioner and respondent (collectively 'the parties'), both 74 years old at the time of the trial, were married in January 1974. Over their decades together, they raised a family comprising four children ('the children'), namely, two sons and two daughters.

[4] During their marriage, the respondent dedicated her life to homemaking and raising the children, while the petitioner pursued a career as a contractor specialising in house renovations through his company, Syarikat Pembinaan dan Perniagaan Ngai Shoot Sdn Bhd ('Ngai Shoot').

[5] In July 2000, the petitioner converted to Islam. Subsequently, in August 2020, he married an Indonesian Muslim woman, referred to in these grounds of judgment as TEB. The petitioner and TEB welcomed a daughter in February 2001.

[6] In May 2021, the petitioner-initiated divorce proceedings ('the divorce petition'). The respondent responded and cross-petitioned in August 2021 ('the cross-petition').

[7] Initially, the respondent had included TEB as a co-respondent in the cross-petition. However, following the decision of the Federal Court in *AJS v. JMH & Another Appeal* [2022] 1 CLJ 331, which decided that Muslims cannot be made parties in legal disputes concerning the marital issues of non-Muslims, the respondent withdrew her claim against TEB.

The issues

[8] The issues that had to be addressed by this court were as follows:

(i) spousal maintenance – in the deliberation of whether spousal maintenance should be awarded, it was imperative to consider the following issues:

(a) whether the breakdown of the marriage was due to the petitioner's conversion to Islam or whether it was due to the petitioner's adulterous relationship with TEB, and if it was due to such adultery, whether the respondent had found such adultery intolerable; and

(b) whether the respondent had fulfilled the 'means and needs' test to justify her claim for arrears in maintenance;

(ii) matrimonial assets – with regard to the matrimonial assets ("the matrimonial assets"), the issue was whether the respondent was entitled to equal division of all the matrimonial assets, which included the matrimonial home ("the matrimonial home"); other immoveable properties; shares in Ngai Shoot, vehicles, and watches and jewellery.

[9] The divorce was granted and the *decree nisi* was made absolute immediately. The matrimonial assets were divided accordingly between the petitioner and respondent, and the petitioner was ordered to pay spousal maintenance to the respondent in the form of transferring to the respondent his half share in a property that he co-owned with the parties' daughter. The following are my reasons.

Contentions, Evaluation, And Findings

Maintenance

[10] In navigating the complexities surrounding the maintenance matter, focus was placed on s. 77(1) of the Law Reform (Marriage and Divorce) Act 1976 ("the Law Reform (Marriage and Divorce Act"). The provision reads:

Section 77 - Power of court to order maintenance of spouse

(1) **The court may order a man to pay maintenance to his wife or former wife**:

(a) during the course of any matrimonial proceedings;

(b) **when granting** or subsequent to the grant of a decree of divorce or judicial separation;

(c) if, after a decree declaring her presumed to be dead, she is found to be alive.

(emphasis added)

[11] Despite the discretionary power held by the court in handling maintenance claims by a wife, the court was guided by the degree of responsibility assigned to each party for the breakdown of the marriage, and the 'means and needs' test, outlined by s. 78 of the Law Reform (Marriage and Divorce) Act, which reads:

Section 78 - Assessment of maintenance

In determining the amount of any maintenance to be paid by a man to his wife or former wife or by a woman to her husband or former husband, the court shall base its assessment primarily on **the means and needs of the parties**, regardless of the proportion such maintenance bears to the income of the husband or wife as the case may be, **but shall have regard to the degree of responsibility which the court apportions to each party for the breakdown of the marriage**.

(emphasis added)

[12] In my evaluation of whether the respondent was deserving of maintenance, I found guidance in established legal precedents, specifically the cases of *Dr Shameni Pillai PB Rajedran v. Dr S Arulselvam Sanggilly & Anor* [2011] 6 CLJ 782, and *V Sandrasagaran Veerapan Raman v. Dettarassar Velentine Souvina Marie* [1999] 5 CLJ 474. These cases underscored the importance of considering the following factors:

(i) the income, earning capacity, property, or financial resources that each party presently possesses or is likely to possess in the foreseeable future;

(ii) the financial needs, obligations, and responsibilities that each party currently or is likely to have in the foreseeable future;

(iii) the standard of living enjoyed by the family prior to the breakdown of the marriage;

(iv) the age of each party and the duration of their marriage;

(v) any existing health, physical, or mental disability of the parties;

(vi) the respective contributions made by each party to the welfare of the family; and

(vii) the duration of the marriage.

Whether Breakdown Of Marriage Was Due To Petitioner's Adultery With TEB Or His Conversion To Islam

[13] It was undisputed that the petitioner had converted to Islam in July 2000. However, the pivotal question at hand revolved around whether he had engaged in an adulterous relationship with TEB prior to his marriage to TEB, as contended by the respondent, and whether such adulterous relationship with TEB had caused the irretrievable breakdown of the marriage with the respondent. Central to the respondent's argument was s. 54(1)(a) of the Law Reform (Marriage and Divorce) Act, which stipulates:

> Section 54 - Proof of breakdown
>
> (1) In its inquiry into the facts and circumstances alleged as causing or leading to the breakdown of the marriage, the court shall have regard to one or more of the following facts, that is to say:
>
> (a) that the **respondent has committed adultery and the petitioner finds it intolerable to live with the respondent**;
>
> (emphasis added)

[14] The fact that the relationship between the petitioner and TEB culminated in marriage and the birth of a daughter was also not disputed. The petitioner argued that his subsequent marriage to TEB and birth of their daughter refuted any claims of adultery by the respondent. Persistently throughout the trial, the petitioner's counsel emphasised that this court lacked jurisdiction to probe into the relationship between the petitioner and TEB, citing their marriage solemnised under Islamic law as beyond reproach.

[15] I disagreed with the petitioner's contention for several reasons. Firstly, TEB was no longer cited as a co-respondent as a result of the Federal Court case of *AJS v. JMH & Another Appeal*, as alluded to earlier. TEB was merely a witness, subpoenaed by the respondent, and who testified as SR4. The crux of the testimony of TEB was relevant in determining whether the irretrievable breakdown of the marriage between the petitioner and respondent stemmed from the respondent's allegations of adultery between the petitioner and TEB, or the petitioner's conversion to Islam.

[16] During examination of TEB, she had conceded that both she and the petitioner had engaged in sexual intercourse prior to their marriage. This admission came to light when the respondent's counsel highlighted to TEB the timing of their daughter's birth, which occurred just slightly over five months after the marriage of the petitioner and TEB. This crucial timeline had cast doubt on the petitioner's assertion that there was no premarital sexual intercourse between the petitioner and TEB.

[17] In response, the petitioner's counsel attempted to redirect the examination of TEB by invoking Islamic law, arguing that the legitimacy of the petitioner and TEB's daughter fell within its purview. Furthermore, they contended that the issue was unsuitable for adjudication by this civil court.

[18] I had to disagree with the petitioner's stance as it had neglected to confront the pivotal matter, that is, TEB's acknowledgment of premarital sexual relations with the petitioner whilst the latter was still married to the respondent. Additionally, TEB admitted to being pregnant with their daughter before her marriage to the petitioner, thereby refuting the petitioner's claim that no such sexual relations with TEB had occurred prior to their marriage.

[19] Secondly, the petitioner's counsel had brought to this court's attention that in Islam, as long as a child is born six months after the marriage, such child is legitimate. Although I was mindful of that fact, in this case, however, the daughter of the petitioner and TEB was born in a timeframe shorter than the prescribed six months, leading to the inescapable conclusion that the petitioner and TEB had engaged in sexual relations prior to their marriage.

[20] In any event, it was imperative to emphasise that the legitimacy or otherwise of the daughter of both the petitioner and TEB, while significant in the context of Islamic law, was not an issue before this court, in relation to the question of adultery between the petitioner and TEB, relied on by the respondent. The focus in this court remained squarely on whether the petitioner's actions constituted adultery, irrespective of his daughter's legal status in Islam. Hence, I had to agree with the respondent that adultery had, in fact, been committed by the petitioner and TEB.

[21] At this juncture, it became crucial to delve into the credibility of the petitioner, particularly regarding his assertions concerning premarital sexual relations with TEB. It was evident that the petitioner misled the court by adamantly denying any involvement in premarital sexual intercourse with TEB. Such deliberate falsehoods had cast a shadow over the petitioner's credibility and integrity, raising significant doubts about the veracity of his testimony and the reliability of his claims throughout the proceedings. This blatant attempt to mislead the court not only undermined the pursuit of truth but also eroded trust in the petitioner's assertions regarding the nature of his relationship with TEB. As such, it was imperative for the court to thoroughly scrutinise the petitioner's statements and evidence throughout this trial and weigh them against the available evidence to ascertain the facts of the case.

[22] Although I had made a finding of fact that the petitioner had indeed committed adultery with TEB, the subsequent inquiry pertained to whether the respondent had found the adultery intolerable, as outlined in s. 54(1)(a) of the Law Reform (Marriage and Divorce) Act.

[23] At this juncture, it was crucial to appreciate the concept of 'tolerance/tolerate', which refers to the act of allowing or permitting something without interference or resistance, despite not necessarily approving or agreeing to it. It is the willingness to accept someone or something, especially opinions or behaviour or people that one may not agree with.

[24] In the present case, the respondent admitted her awareness of the adultery, although she maintained that she only learned about the subsequent marriage between the petitioner and TEB, along with the birth of their daughter, a few years later. In any event, despite this knowledge, she chose not to pursue a divorce under s. 54(1)(a) of the Law Reform (Marriage and Divorce) Act, and even continued to accept maintenance from the petitioner, although sporadically, at least until 2012. This deliberate choice to maintain the marital bond, despite the significant developments, undermined the credibility of her claim that the adultery was intolerable and led to the irretrievable breakdown of the marriage.

[25] Furthermore, the respondent's belated assertion of the adultery allegations in August 2021, a staggering two decades or so after becoming aware of the petitioner's extramarital conduct, further weakened her stance. In my view, therefore, the respondent's failure to act upon her knowledge of the petitioner's adultery, coupled with her prolonged continuation of the marriage, signified a tacit acceptance or tolerance of the situation. Consequently, the respondent was not in a position to assert that the marriage had irretrievably broken down due to adultery.

[26] At this juncture, it was imperative to underscore that permitting an individual to cite adultery as the catalyst for the dissolution of their marriage, following years of awareness without action, would not only defy principles of justice and equity but would also contravene the very essence of accountability.

[27] It is a well-established principle that the law does not extend its assistance to those who are passive in their legal pursuits, a maxim that holds true even in family law proceedings. It is interesting to note that in the context of Singapore, s. 95(5) of the Women's Charter 1961, stipulates that a person cannot seek divorce on grounds of adultery if they continue cohabiting with their spouse for six months or more after discovering the adulterous relationship. While the Law Reform (Marriage and Divorce) Act lacks a similar limitation provision, there is a compelling case for considering analogous amendments to dissuade litigants from neglecting their rights over time.

[28] As such, the only cause of the breakdown of the marriage that both respondent and petitioner could rely on was the latter's conversion to Islam pursuant to s. 51 of the Law Reform (Marriage and Divorce) Act, which reads:

> Section 51 - Dissolution on ground of conversion to Islam
>
> (1) Where one party to a marriage has converted to Islam-
>
> (a) **either party may petition for a divorce** under this section or s. 53; or
>
> (b) both parties may petition for a divorce under s. 52.

(2) The Court upon dissolving the marriage or at any time, may make provision for the wife or husband, and for the support, care and custody of the children of the marriage, if any, under Part VII and Part VIII and may attach any conditions to the decree of the dissolution as it thinks fit.

(3) Section 50 shall not apply to any petition for divorce where one party has converted to Islam.

(emphasis added)

[29] It was crucial, at this juncture, to contextualise the evolution of the relevant legal framework, including the amendments introduced by the Law Reform (Marriage and Divorce) (Amendment) Act 2017, which came into effect on 15 December 2018. A comprehensive examination of both the pre-amendment and post-amendment versions of s. 51 of the Law Reform (Marriage and Divorce) Act was warranted and is displayed in Table A below.

Table A

Prior to 15 December 2018	Wef 15 December 2018
Section 51 – Dissolution on ground of conversion to Islam	Section 51 – Dissolution on ground of conversion to Islam
(1) Where one party to a marriage has converted to Islam, **the other party who has not so converted may petition for divorce:** Provided that no petition under this section shall be presented before the expiration of the period of three months from the date of the conversion.	(1) Where one party to a marriage has converted to Islam: (a) either **party may petition for a divorce** under this section or section 53; or (b) both parties may petition for a divorce under s. 52.
(emphasis added)	(emphasis added)

[30] Upon an examination of s. 51 of the Law Reform (Marriage and Divorce) Act, it became evident that prior to the amendment, once a spouse has converted to Islam, he or she would not be able to petition for divorce in the civil courts as the right to do so was available only to the non-converted spouse. Since the petitioner had converted in 2000, it was, therefore, up to the respondent to file a divorce petition to dissolve the marriage pursuant to s. 51 of the Law Reform (Marriage and Divorce) Act. However, she chose not to pursue this course of action, citing her desire to salvage the marriage as justification for her inaction.

[31] Indeed, the petitioner testified that in 2012, he initiated proceedings at the Kuala Lumpur Syariah Court to dissolve his marriage with the respondent. However, the respondent had declined to participate in the Syariah Court proceedings. This suggested that the respondent had no

intention of initiating the dissolution of the marriage and, instead, chose to obstruct the petitioner's endeavour to move forward in life with his new family by abstaining from participation in the legal proceedings.

[32] Despite the respondent's hesitance to initiate divorce proceedings based on the petitioner's conversion to Islam, it was important to note that the petitioner himself exhibited a delay in taking action. As illustrated in Table A, the law was amended, effective from 15 December 2018, granting the converted party the right to initiate divorce proceedings as well. However, the petitioner did not act upon this amendment promptly and instead waited for three years before filing the divorce petition. This delay demonstrated a lack of urgency on the part of the petitioner in finalising his divorce from the respondent in the civil court.

[33] Nevertheless, it became evident that the marriage between the petitioner and respondent had irretrievably broken down, rendering any further delay unnecessary, especially since the petitioner, TEB, and their daughter had already formed their family unit. Consequently, the *decree nisi* was granted and made absolute immediately.

Whether Respondent Had Fulfilled The 'Means And Needs' Test

[34] Emphasising the importance of s. 78 of the Law Reform (Marriage and Divorce) Act in addressing spousal maintenance, it was crucial to underscore the principle of examining the 'means and needs' of both parties involved. This provision mandates a thorough evaluation, not only of the petitioner's financial capabilities but also those of the respondent.

[35] Concerning the respondent's plea for a lump sum of RM200,000 to address outstanding maintenance for the last 20 years or so, it was essential to recognise that such a substantial amount was not warranted for several reasons. Firstly, as outlined in s. 86 of the Law Reform (Marriage and Divorce) Act, any directive regarding arrears of maintenance is constrained to a maximum period of three years. This statutory constraint is unequivocal, as reaffirmed in s. 86 of the Law Reform (Marriage and Divorce) Act, which states:

> Section 86 - Recovery of arears of maintenance
>
> (1) Subject to subsection (3), arrears of unsecured maintenance, whether payable by agreement or under an order of court, shall be recoverable as a debt from the defaulter and, where they accrued due before the making of a receiving order against the defaulter, shall be provable in his or her bankruptcy and, where they accrued due before his or her death, shall be a debt due from his or her estate.
>
> (2) Subject to subsection (3), arrears of unsecured maintenance which accrued due before the death of the person entitled thereto shall be recoverable as a debt by the legal personal representatives of such person.

(3) **No amount owing as maintenance shall be recoverable in any suit if it accrued due more than three years before the institution of the suit**. (emphasis added)

[36] Secondly, there lacked a justifiable basis for such an exorbitant amount. It was imperative to underscore that divorce proceedings should not devolve into a means of financial gain. The essence of divorce proceedings should always aim at equipping parties with adequate resources to transition smoothly into their postmarital lives.

[37] Furthermore, the respondent's acknowledgment stands as evidence that notwithstanding the petitioner's marriage to TEB, he continued to provide financial support to the respondent, extending as far as 2012. Therefore, the assertion by the respondent of not receiving maintenance for the past two decades is demonstrably inaccurate.

[38] Most importantly, it was admitted by the respondent herself that she had been receiving rental income from a property known as the Bunga Raya property, which was jointly registered in the names of the petitioner and one of their daughters. In light of this revelation, it was reasonable to assert that the rental income had already served as a form of maintenance received by the respondent, as that property did not belong to her.

[39] In addressing future maintenance considerations, it was evident that the petitioner bore some responsibility to support the respondent. Throughout their marriage, she had dedicated herself to domestic duties and child-rearing. However, it emerged from testimonies, including those of the children, who testified as SR2 and SR3 on behalf of the respondent, that the petitioner had neglected both the emotional and financial well-being of the family following his involvement with TEB. Notably, he lavished his resources on TEB, showcasing their affluence through extravagant vacations and purchases, thereby causing considerable distress to the respondent and the children. Furthermore, the petitioner extended financial support for the education of his daughter with TEB while disregarding his obligations towards the respondent and the children.

[40] The petitioner argued that, given his age of 74, sustaining monthly maintenance payments would impose a significant financial strain.

[41] I was mindful that the respondent had not specifically pleaded for ongoing monthly maintenance, as she had relied on rental income from the Bunga Raya property for financial support. However, the respondent did plead for 'relif-relif lain yang dianggap sesuai, manfaat dan adil oleh Mahkamah Yang Mulia ini,' which phrase provided the court discretion to provide some form of relief, provided it was reasonable, just, and related to the nature of the relief sought.

[42] Consequently, I took the view that transferring the petitioner's half share in the Bunga Raya property to the respondent within 30 days from the date of this decision, which was 15 March 2024, was warranted for several reasons.

[43] Firstly, it was not disputed that the respondent's financial needs were being met through the rental income from the Bunga Raya property. Therefore, maintaining this arrangement would alleviate the necessity for monthly maintenance payments. Secondly, the absence of objections from the petitioner regarding the respondent's receipt of rental income over the years implied tacit acceptance. Therefore, it was equitable to uphold this arrangement.

[44] Thirdly, considering that the petitioner initiated the divorce proceedings without fault on the part of the respondent, fairness dictated ongoing support from the petitioner. Fourthly, acknowledging the financial burden that monthly maintenance payments would pose on the petitioner, particularly given his age, it was his counsel who proposed the property transfer as an alternative form of support.

[45] Strengthened by the court's discretionary powers under s. 77 of the Law Reform (Marriage and Divorce) Act, to order a man to pay maintenance to his wife or former wife upon granting a decree of divorce, *in lieu* of an order for monthly maintenance, I ordered the transfer of the petitioner's half share in the Bunga Raya property to the respondent within 30 days from the date of this decision, which was 15 March 2024.

[46] Both counsels for the petitioner and respondent urged for the transfer to occur before the *decree nisi* was made absolute, citing 'love and affection' as consideration between spouses. While acknowledging their request, I emphasised that, from the court's perspective, the transfer must be completed within the stipulated timeframe of 30 days. If the parties choose to wait to make the *decree nisi* absolute only after the Bunga Raya property is transferred to the respondent, they are free to reach a mutual agreement to proceed in this manner.

Division Of Matrimonial Assets

[47] The task of dividing matrimonial assets is prescribed by s. 76 of the Law Reform (Marriage and Divorce) Act, which reads:

> Section 76 - Power of court to order division of matrimonial assets
>
> (1) The court shall have power, when granting a decree of divorce or judicial separation, to order the division between the parties of any assets acquired by them during the marriage or the sale of any such assets and the division between the parties of the proceeds of sale.
>
> (2) In exercising the power conferred by subs. (1) the court shall have regard to:

(a) the extent of the contributions made by each party in money, property, or work towards the acquiring of the assets or payment of expenses for the benefit of the family;

(aa) the extent of the contributions made by the other party who did not acquire the assets to the welfare of the family by looking after the home or caring for the family;

(b) any debts owing by either party which were contracted for their joint benefit;

(c) the needs of the minor children, if any, of the marriage;

(d) the duration of the marriage;

[48] I was also guided by the Court of Appeal in *Annathurai Venkidasalam v. Vani Welluven* [2023] CLJU 2191; [2023] 1 LNS 2191 where Lim Chong Fong JCA had opined in the following passage:

...

[18] In re-visiting s. 76 LRA, and we make the following observations:

(i) *Albeit* it is stated in s.76(2) LRA that the court shall incline towards equality, it is however not mandatorily 50%-50% in dividing the matrimonial property and assets;

(ii) The division is at the discretion of the court but the court must take into account the factors listed in s. 76(2)(a) to (e) LRA;

(iii) *There is no prohibition on the court to also take into account other relevant or appropriate circumstances* because the aforesaid factors have not been expressly specified in s. 76(1) and (2) LRA as exclusive and/or exhaustive, see *Dean v. Wiesengrund* [1955] 2 QB 120 and *S (a minor) v. Special Education Needs Tribunal* [1996] 1 All ER 171; and

(iv) *The division is not an exercise of strict financial accounting but a fair and equitable distribution of the matrimonial property and assets as determined by the court*.

[19] Therefore, there is no strait-jacket solution. *Each and every case has to be determined on its peculiar facts and circumstances*.

(emphasis added)

[49] In my view, the classification of assets as matrimonial cannot solely be determined by registered ownership. Drawing insight from the pertinent case of *Ching Seng Woah v. Lim Shook Lin (F)* [1997] 1 CLJ 375; [1997] 1 MLJ 109, Gopal Sri Ram JCA (as he then was) provided a definition of 'matrimonial assets'. In that case, he outlined the concept beyond mere ownership, emphasising factors that contribute to the matrimonial assets. The following passage from the case serves as a guiding principle in understanding the broader scope of matrimonial assets:

The Act does not define what matrimonial assets are. We think that during the subsistence of a marriage *the expression refers to the matrimonial home and everything which is put into it by either spouse with the intention that their*

A *home and chattels should be a continuing resource for the spouses and their children to be used jointly and severally for the benefit of the family as a whole. It matters not in this context whether the asset is acquired solely by the one party or the other or by their joint efforts*. Whilst the marriage subsists these assets are matrimonial assets. Such assets could be capital assets. The earning power of each spouse is also an asset.

B (emphasis added)

[50] Regarding the division of matrimonial assets, the respondent asserted her entitlement to an equal share, advocating for a 50% division of all assets accumulated by the petitioner throughout the duration of the marriage. This encompassed various assets such as immovable properties, shares in
C companies, vehicles, funds deposited in the petitioner's fixed deposit bank accounts and Tabung Haji Amanah Trust Fund, as well as jewellery including watches.

Whether Respondent Was Entitled To Division Of The Value Of Immoveable
D *Properties*

[51] With regard to immoveable properties, the respondent claimed for the petitioner's half share in the following properties to be transferred to her:

(i) a property known as the Setapak property ("matrimonial home") held in the joint names of the petitioner and respondent;

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(ii) a property known as the Bunga Raya property held in the joint names of the petitioner and the daughter of the parties;

(iii) a property known as the Medan Idaman property held in the joint names of the petitioner and the son of the parties; and

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(iv) a property known as the Kajang property held in the joint names of the petitioner and TEB.

[52] In addressing the disposition of the matrimonial home, which stood under the joint ownership of both parties, I ordered the transfer of the
G petitioner's half share to the respondent for several reasons. Firstly, the petitioner had vacated the matrimonial home over two decades ago, offering only sporadic maintenance payments until 2012, while the respondent and the children navigated life's challenges independently.

[53] During this period, the petitioner embarked on a new marital
H relationship with TEB, extending financial support to her and their daughter. Notably, the petitioner attempted to diminish the extent of his and TEB's opulent lifestyle, despite contradicting evidence from TEB during examination. The ostentatious and insensitive displays of affluence by the petitioner and TEB on social media inflicted additional distress on the
I respondent, who remained legally bound to the petitioner and relied on the children for financial stability. Such behaviour by the petitioner, including TEB demonstrated a callous and insensitive disregard for the respondent's

well-being and underscored the need for equitable redress in the distribution of matrimonial assets. Given that the matrimonial home was the respondent's sole residence, and considering her age and familiarity with the property, I took the position that the respondent should continue to reside in the matrimonial home and own it.

[54] Furthermore, it was imperative to consider the duration of the marriage in reaching a fair decision. The parties remained married for over 26 years before the breakdown of the marriage, with an additional 21 years passing before the petitioner had initiated divorce proceedings. Despite the respondent's non-monetary contribution towards the matrimonial home, her role in maintaining the household and nurturing the family over the years could not be understated.

[55] The petitioner, after his marriage to TEB, had taken steps to acquire a property, referred to as the Kajang property, for TEB and their daughter. While the Kajang property now serves as the matrimonial home for the petitioner and TEB, it was essential to note that it was procured during the petitioner's marriage to the respondent. Nevertheless, I reached the conclusion that the Kajang property should remain undivided, considering that TEB was listed as a co-owner and it currently serves as the matrimonial home for both the petitioner and TEB. The decision regarding the Kajang property fortified the rationale behind granting full ownership of the matrimonial home to the respondent, as it ensured equitable distribution of assets between the parties.

[56] Regarding the Bunga Raya property, I had previously determined that, *in lieu* of monthly maintenance payment, the petitioner's half share in such property was to be transferred to the respondent for her to monetise it for ongoing spousal support.

[57] Given that the petitioner's share in both the Bunga Raya property and the matrimonial home were to be allocated to the respondent, I was of the view that it was reasonable for the petitioner to retain the Kajang Property and his half share in the Medan Idaman property. This division, in my view, constituted a fair and equitable distribution of the immovable properties involved.

Whether Respondent Was Entitled To Division Of Shares In Company

[58] Regarding the petitioner's shares in Ngai Shoot, the respondent's claim for division was dismissed for several reasons. Firstly, the petitioner clarified that he had ceased involvement with Ngai Shoot, having retired from any directorial or employment roles. Consequently, he no longer relied on Ngai Shoot for income.

[59] Secondly, the respondent's claim relied solely on bank account statements from Ngai Shoot spanning from 2000 to 2010, lacking any current documentation or evidence of the petitioner's current involvement or interest

in the company. Given the extensive period of separation between the parties, exceeding two decades, it became evident that the respondent lacked updated knowledge about the status of Ngai Shoot. Consequently, there was no justification for division of the petitioner's shares in Ngai Shoot as matrimonial assets.

[60] Thirdly, the respondent neglected to establish any connection between herself and Ngai Shoot. The presence of this connection was a crucial factor for the court's consideration, especially since Ngai Shoot was acquired by the petitioner, and not the respondent. In this regard, I found guidance in the Court of Appeal's ruling in *Yap Yen Piow v. Hee Wee Eng* [2016] CLJU 1060; [2016] 1 LNS 1060, emphasising the significance of this nexus:

> [4] The real challenge and ambiguity in division of properties upon the dissolution of marriage arises in relation to property acquired during the marriage. When it relates to matrimonial property (or home) *ie*, the house (or more than one) and all movable and immovable assets in the house or having *nexus* to the house, such as a car, etc. which is meant to be used by the family, the courts have generally acknowledged that it falls under matrimonial property which will fall under s. 76(1) of LRA 1976, provided it was acquired by the joint efforts of the spouses though one spouse may not have contributed in cash but the consideration may have been in kind. **The *nexus* appears to be the enjoyment and use. If there is no enjoyment and/or use for current common purpose, it will appear the nexus test may not be satisfied**. In this respect, future funds such as EPF, insurance, pension, etc. may not fall in this category.
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> (emphasis added)

[61] Fourthly, it was imperative to consider that dividing any interest the petitioner held in Ngai Shoot would directly impact his ability to fulfil familial obligations, particularly in supporting his young daughter's education. The court had to acknowledge the significance of these familial responsibilities, recognising that the income from Ngai Shoot, if at all, would serve as a crucial source for meeting the petitioner's current familial obligations.

Whether Respondent Was To Division Of Value/Number Of Vehicles

[62] Regarding the vehicles, the respondent claimed in her pleadings for a share in the value of a Daihatsu Delta Commercial Truck, a Mercedes Benz E200, and a Honda CRV.

[63] As evidence, the respondent adduced registration certificates of the vehicles dated 2006, 2009, and 2010 respectively. However, there was no current documentation confirming the status of these vehicles. Additionally, considering the respondent's prolonged inaction over approximately a decade, it would be unjust to grant her a division of assets purchased so long ago.

[64] Furthermore, it was crucial to highlight that the Daihatsu Delta Commercial Truck was not owned by the petitioner but by Ngai Shoot. Therefore, no division of this vehicle could be justified as it belonged to a third party, namely the company.

Whether Respondent Was Entitled To Division Of Monies And Jewellery

[65] As for the monies in the petitioner's fixed deposit bank accounts and Tabung Haji Amanah Trust Fund, alongside the jewellery and watches supposedly owned by the petitioner, the respondent's claim lacked specificity and supporting evidence. The respondent had failed to provide detailed descriptions of these items, nor did she produce any documentary evidence to substantiate her assertions. In contrast, the petitioner asserted that any watches and jewellery in his possession were acquired post-separation.

[66] At this juncture, it was crucial to remind parties that the burden of proof was with the respondent since she initiated the claim. She must demonstrate, on a balance of probabilities, the existence of the claimed jewellery and watches and establish their ownership. This is trite law as prescribed by s. 103 of the Evidence Act 1950, which reads:

> Section 103 - Burden of proof as to particular fact
>
> The **burden of proof as to any particular fact** lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
>
> (emphasis added)

[67] Not only did the respondent have the legal burden to prove, she had to prove it on a balance of probabilities, which is the civil standard of proof.

[68] The respondent, however, had not even proved the existence of any jewellery or watches as she had claimed, let alone the averment that they were matrimonial assets.

[69] On this note, I drew guidance from the case of *Muthuraja Suppiah v. Sukumar Kokila* [2020] CLJU 2183; [2020] 1 LNS 2183; [2020] 1 MLRHU 1820, where it was stated in the following passage:

> The last item in contention was that of some jewellery itemised by the respondent which she sought the return of from the petitioner. Unfortunately, **the respondent could not provide any cogent evidence that the said items were being held by the petitioner**. Such being the case, this Court declines to make any order with regard to this issue.
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> (emphasis added)

[70] I was also compelled to quote Lord Goddard in *Bonham-Carter v. Hyde Park Hotel Ltd* [1948] 64 TLR 177 cited in *Sum Kum v. Devaki Nair & Anor* [1963] CLJU 131; [1963] 1 LNS 131; [1964] 3 MLJ 74:

A **It is not enough to write down the particulars and throw them at the head of Court**, saying, "This is what I have lost; I ask you to give me damages.

(emphasis added)

[71] Regrettably, the respondent's approach mirrored this sentiment. She B made claims without sufficient substantiation, expecting the court to grant her requests. Without proper documentation, the court had no choice but to rely on oral testimonies. However, scrutiny revealed that the respondent's oral testimony was vague and ambiguous, lacking conviction.

Conclusion

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[72] In conclusion, drawing upon the aforementioned rationales and having undertaken a thorough examination and discerning evaluation of the comprehensive evidence before this court, in conjunction with the submissions put forth by the parties, the *decree nisi* was made absolute immediately, and, it was ordered that the petitioner's share in the D matrimonial home and Bunga Raya property be transferred to the respondent within 30 days from the date this decision was delivered, which was 15 March 2024. Costs of the proceedings in the amount of RM10,000 (subject to allocatur) were to be borne by the petitioner.

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